



August 26, 2002

Mr. Tim Molina
Assistant Attorney General
Assistant Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2002-4746

Dear Mr. Molina:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 166948.

The Office of the Attorney General (the "attorney general") received two requests for information about the attorney general's inquiry into a specified contract between National Heritage Insurance Company ("NHIC") and the State of Texas. The responsive information consists of a report created by the attorney general with attachments. The attorney general initially claimed that the requested information was excepted from disclosure pursuant to sections 552.101, 552.103, 552.104, 552.107(1), and 552.111 of the Government Code, as well as rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. Subsequently, however, the attorney general withdrew the attorney-client privilege claims and released all of the requested information except for information the release of which may implicate NHIC's proprietary interests.¹ Although the attorney general made no arguments pertaining to NHIC's interests, the attorney general notified NHIC of its right to submit arguments to this office in accordance with section 552.305(d) of the Government Code. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 2 (1990) (determining that in certain circumstances statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and

¹Thus, the only information that is at issue in this decision is that information the release of which may implicate NHIC's proprietary interests.

explain applicability of exceptions to disclosure). NHIC responded to the notice and asserted that section 552.110 of the Government Code excepted portions of the information at issue from disclosure. We have considered NHIC's arguments and have reviewed the information at issue.

Section 552.110(a) excepts from public disclosure a person's trade secrets. The Texas Supreme Court has adopted the following definition of "trade secret":

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to a claim of trade secret, this office accepts a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990).

Section 552.110(b) excepts from public disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." We note that "commercial or financial information" as used in section 552.110(b) refers to information that relates to the commercial or financial condition of the person or entity that provided the information to the governmental body. *See* Open Records Decision No. 550 at 5 (1990). We also note that section 552.110(b) requires a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure. *See* Open

² The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); *cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

NHIC states that some of the information was provided to the attorney general under an agreement or understanding of confidentiality, but also acknowledges that information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), cert. denied 430 U.S. 931 (1977). NHIC, thus, argues that all of the information at issue is excepted from disclosure under section 552.110 as trade secret information and/or information the release of which would cause it substantial competitive harm.

In regard to NHIC's section 552.110(a) claim, we find that NHIC only submitted certain general assertions with regard to the above-referenced six trade secret factors, but did not explain how these factors apply to the specific information at issue. Furthermore, NHIC did not explain how any of the information at issue meets the above-quoted definition of a trade secret. We, therefore, conclude that in this instance, NHIC has not made a *prima facie* case of trade secret protection for any portion of the information at issue. Accordingly, the attorney general may not withhold from disclosure any portion of the information at issue under section 552.110(a) of the Government Code.

In regard to NHIC's section 552.110(b) claim, we first observe that much of the information at issue does not appear to relate to NHIC's commercial or financial condition. Furthermore, with regard to the remaining information that does appear to relate to NHIC's commercial or financial condition, we find that NHIC only made certain general assertions of competitive harm, but did not demonstrate through specific factual or evidentiary material that substantial competitive injury would likely result from disclosure of that information. Accordingly, we conclude that the attorney general may not withhold from disclosure any portion of the information at issue under section 552.110(b) of the Government Code.

However, we note that the information at issue contains a Texas driver's license number that is subject to section 552.130 of the Government Code. Section 552.130 excepts information from disclosure that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See Gov't Code* § 552.130. Accordingly, the attorney general must redact from the information at issue the driver's license information that we have marked pursuant to section 552.130 of the Government Code.

We also note that the information at issue contains e-mail addresses that may be excepted from disclosure under section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in pertinent part:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Unless the holder of the e-mail address affirmatively consents to its release, the attorney general must redact from the information at issue the e-mail addresses that we have marked in accordance with section 552.137 of the Government Code.

In summary, the attorney general must redact from the information at issue the Texas driver's license number that we have marked pursuant to section 552.130 of the Government Code. The attorney general must redact from the information at issue the e-mail addresses that we have marked in accordance with section 552.137 of the Government Code, unless the members of the public in question have affirmatively consented to their release. The attorney general must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839.

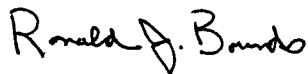
The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 166948

Enc. Marked documents

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